No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16.5, appellants file this brief in opposition to appellees' motion to dismiss or affirm in order to rebut appellees' statements concerning the procedural posture of this case. Specifically, this brief demonstrates that appellants squarely challenged the constitutionality of the Unruh Act in the courts below, on grounds of freedom of association and vagueness and overbreadth.

Appellees falsely assert in their motion:

> . . . appellants did not draw in question the validity of that [Unruh] act on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Title 28 U.S.C. section 1257(2) requires them to do so in order to give this Court jurisdiction on appeal. [Motion at 4.]

To the contrary, in their brief to the Court of Appeal, appellants explicitly stated:

> The Unruh Act Cannot Be Constitutionally Applied to Memberships in Private Organizations Except Where Such Memberships Comprise a Vehicle for Public Sale of Goods, Services, or Commercial Advantages. [Brief at 23.]

Further, that brief contended:

> To apply the Unruh Act to Rotary would be to apply it to the type of organization specifically excluded from the Minnesota Act. [Brief at 25.]

The Court of Appeal clearly understood the argument which appellants were making and rejected it, holding:

> . . . application of the Unruh Act to International does not abridge its freedom of intimate or expressive association. [App. C-28]

The trial court equally understood appellants' contentions, and agreed with them:

> . . . to require Rotary International *pursuant to the Unruh Act* to offer its membership to women (as well as to the entire public indiscriminately) would inflict severe, irreparable, and unconscionable harm upon Rotary and the associational rights of its members without commensurate or any substantial resulting economic benefit to women or the public.
>
> * * *
>
> Where, as here, there is no persuasive proof that exclusion from membership in the purely private organizations comprising Rotary has imposed a material or substantial economic constraint upon any woman, it would be a violation of the defendants' rights to liberty of association under the United States Constitution for the California Courts *or Legislature* to require the defendant organizations to accept women in contradiction of the male only membership restrictions which

> have frequently and recently been reaffirmed democratically by the members of Rotary. . . . [App. B-9, B-13]

The constitutionality of the Unruh Act was directly implicated in this case from its inception; the trial court construed the Unruh Act as inapplicable, thus avoiding the need to hold it unconstitutional. The Court of Appeal, however, met the challenge head-on and held that the Act applied to appellants and was constitutional nevertheless. Jurisdiction clearly lies under 28 U.S.C. § 1257(2) and 28 U.S.C. § 2101(c).

Even if this were not so, however, it is clear that this is a case where appellants claimed the constitutional right of freedom of association and such claim was denied by the Court of Appeal. As appellees recognize, in such cases a petition for certiorari under 28 U.S.C. § 1257(3) is appropriate, and this Court may treat the jurisdictional statement as a petition for writ of certiorari. *Local 926, International Union of Operating Engineers,* 460 U.S. 669 (1983); *Palmore* v. *U.S.,* 411 U.S. 389 (1973). For the reasons set forth at length in appellants' jurisdictional statement, this case should be heard by the Court on the merits so that vitally important issues of national significance can be resolved, whether on appeal or by the grant of a writ of certiorari.

Additionally, appellees, evidently concerned about the obvious vagueness and overbreadth of the Unruh Act as it has been construed by the California courts in numerous cases, including the present, desperately urge this Court not to consider this point. Again, they contend that no argument based on vagueness and overbreadth was advanced below and again they are in error. In respondents' brief to the Court of Appeal, the point was made clearly:

> An even more serious potential for vagueness and overbreadth is that the Unruh Act (unlike the Minnesota statute) does not limit prohibited discrimination to race, color, creed, sex and other categories specifically

> noted in the statute; rather it prohibits substantially *any* selectivity among customers. . . . This may be an appropriate regulation for the clientele of shopping centers, apartment houses, motels, gas stations, and coffee shops. But it is a blunt instrument when applied to organizations like Rotary where voluntary fellowship and congeniality are of the essence, or to any other organization entitled to First Amendment freedoms wherein "precision of regulation must be the touchstone in an area touching our most precious freedoms." *Elrod* v. *Burns,* 427 U.S. 347, 363 (1976). "It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP* v. *Button,* 371 U.S. 415, 435 (1963). [Brief at 26.]

Appellants submit that the constitutional issues of freedom of association, vagueness and overbreadth indeed were raised below. As stated in the jurisdictional statement and in the *amici curiae* briefs in support, the Court should accept jurisdiction of this case in order to deal substantively with vitally important issues.

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Respectfully submitted,

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